86-2039

NO. 87 -

Supreme Court, U.S.
FILED
APR 27 1987
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term , 1986

SAMUEL OKIN,

Appellant,

-against-

COMMISSIONER OF INTERNAL REVENUE,

Appellee.

ON APPEAL FROM THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

JURIDICTIONAL STATEMENT

SAMUEL OKIN,
Appellant,
241 Sands Avenue,
Las Vegas, Nevada 89109
(702) 735-0884

EDITOR'S NOTE:

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

QUESTIONS PRESENTED

L. May the Court of Appeals and the Tax Court negate undisputed tax benefits of $ 18,276.90 through statutory income averaging of his adjusted gross income of $ 99,432 by excluding from the determination of the adjusted gross income to be included in the computation of alternative minimum taxable income, appellant's Treasury Dept. Schedule G (Income Averaging) attached to appellant's tax form 1040, pursuant to statutory provisions, wherein it is computed that $ 89,465 of said adjusted gross income is averageable income, or as computed in respondent's schedule G (made part of the Tax Court's order by incorporation, that the averageable income is $ 91,308, and by starting in the said computation of alternative of alternative minimum taxable income, not with the figure of $ 24,386 computed in said respondent's schedule G in name

of appellant (respondent's computation statement schedule 2) which appears to be average adjusted gross income) but with the initial adjusted gross income of $ 95,732 thereby increasing the alternative minimum taxable income by the sum of $ 71,340 and thereby creating an alternative minimum tax of $ 18,957 and a tax deficiency of $ 18,957, and negating the tax benefits of $ 18,276.90 through income averaging (supra).

2. When appellant elected to income average his adjusted gross income for the computer year 1940, by attaching his said Treasury Dept. Schedule G to his Tax Form 1040, as directed by statute, did his statutory election average his adjusted gross income for the year 1980 for all purposes or only for the purpose of computing his computation of income averaging as referred to

in the opinion of the Court of Appeals and Tax Court or was the computation of income avera ging established for all purposes including the computation of alternative minimum taxable income and tax.

3. Where section 1304 of the Internal Revenue Code provides that the income averaging provisions of the Code shall not be available to certain sections of the Internal Revenue Code but not including section 55, did the Court of Appeals and the Tax Court err in concluding in their opinion that the income averaging provisions of the Code are not available in the determination of the alternative minimum taxable income to be included in the computation of the alternative minimum tax under section 55.

4. Is section 55 of the Code, an integral part of the Internal Revenue Code, interwoven with the other sections,

and not separate as referred to in the opinion of the lower Courts.

5. Where the Tax Court in its order made the respondent's computation the findings of the Tax Court by incorporation the said Tax Court's order, and where as part of the said respondent's computation, there was included as Schedule 2 (Treasury Department Schedule G (in name of appellant)(Income Averaging, Form 1040) wherein it stated that of the adjusted gross income of appellant for the year 1980, the taxable income from tax form 1040 is $ 97,432 and that 30% of the adjusted gross income of the base period of $ 20,412 is $ 6,124 and that the averageable income is $ 91,308, by incorparing the said computation in the said Tax Court's order (supra), are not the said findings are undisputed and are not both the Tax Court and the Court of

Appeals precluded from making any findings contrary thereto and contrary to the computation in said respondent's Schedule G (Computation Schedule 2) that the figure of $ 24,386 is averageable income, and was it not error for the Court of Appeals to affirm the computation of the Tax Court wherein it started with a base of $ 95,732 instead of the said figure of $ 24,386, thereby creating the alternative minimum tax and tax deficiency.

6. May the Court of Appeals affirm a Tax Court order which is contrary to its undisputed findings of fact.

7. If section 55 of the Code can be interpreted as negating tax benefits of a taxpayer pursuant to the income averaging provisions of the Code; because of the existence of preferential income, whereas other taxpayers who have the same statutory benefits of income

ave raging but no preferential income under sec tion 55 retain the statutory tax benefits, does this not create a discriminatory situation contrary to the Constitution.

PARTIES TO THE PROCEEDING

Appellant respectfully states that there mo kmown interested parties other than the parties listed in the caption of the case.

ADDITIONAL SUPPLEMENT TABLE OF CONTENTS

The part of the conference report accompanying H.R. 8363, respecting the enactment of the alternative minimum tax for non-corporate taxpayers, is printed as Appendix G.

OPINIONS BELOW

The opinion of the Circuit Court dated January 26,1987, is printed as Appendix A. The opinion of the Tax Court, dated August 1485, is reported at 49 T.C.M (CCH) 1315 (1985) and reprinted as Appendix B.

SUPPLEMENTAL TABLE OF CONTENTS

The decision of the Tax Court dated August 14, 1985, is reprinted as Appendix D and the computation of the appellee incorporated in the said decision is reprinted as Appendix E.

The judgment of the Circuit Court filed and entered on January 26, 1987 is reprinted as Appendix C.

The notice of appeal dated February 17, 1987, mailed Januray 17, 1987, was filed by the Circuit Court Clerk on March 2,1987 is reprinted as Appendix F.

The amended notice of appeal dated Feb-

ruary 20, 1987, mailed February 21, 1987, was filed by the Circuit Court Clerk on March 2, 1987, is reprinted as Appendix F(1).

The second amended notice of appeal dated March 14, 1987, mailed March 16, 1987, was filed by the Circuit Court Clerk on March 20, 1987, is reprinted as Appendix F(2).

JURISDICTION

The said judgment of the Circuit Court dated January 26, 1987, is final and the United States Supreme Court has jurisdiction of this appeal under U. S. C. Sec. 1254(2).

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A. THE NINTH CIRCUIT S DECISION NEGATES THE APPELLANT S UNDISPUTED TAX SAVINGS PURSUANT TO THE INTERNAL REVENUE CODE (secs. 1301-1305, AND IS CONTRARY TO THE UNDISPUTED FINDINGS OF THE TAX COURT AND WITHOUT ANY SUPPORT IN THE RILEY AND STOCKWELL CASES CITED IN ITS DECISION.....

(1) THE TAX COURT S ORDER INCORPORATES THE FACTS RECITED IN THE RESPONDENT S COMPUTATION AS THE FINDINGS OF THE COURT

(a) THE SAID COMPUTATION OF THE RESPONDENT INCLUDED A MODIFIED TREASURY DEPARTMENT SCHEDULE G (INCOME AVERAGING) IN THE NAME OF APPELLANT_-TAXPAYER, WHEREIN IT IS FOUND THAT OF THE ADJUSTED GROSS INCOME OF THE APPELLANT FOR THE TAXABLE YEAR 1980 IN THE AMOUNT of $ 97,432, the sum of $ 91,208 IS AVERAGEABLE INCOME AND THAT IN THE COMPUTATION OF TAX IT WAS COMPUTED THAT $ 6,124 (30%) OF THE TOTAL $ 20,412 OF

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THE BASE PERIOD INCOME PLUS 20% OF THE AVERAGE-ABLE INCOME $ 18,262 , TOTAL $ 24,386 (WHICH APPEARS TO BE THE AVER-AGE ADJUSTED GROSS INCOME)

(2) THE NINTH CIRCUIT S DECISION IS IS CONTRARY TO SECTION 1304 OF THE INTERNAL REVENUE CODE WHICH PRESCRIBED WHAT PROVIS-IONS OF THE INTERNAL REVENUE CODE INCOME AVERAGING IS INAPPLICABLE (NOT INCLUDING SEC- 55). 8

(3) THE NINTH CIRCUIT S DECISION CITING THE RILEY AND STOCK-WELL DECISIONS IS NOT SUP-PORTED AS THE SAID RILEY AND STOCKWELL DECISIONS ARE WHOLLY DISTINGUISHABLE AS INVOLVING THE TAXPAYER'S ATTEMPT TO

OBTAIN NON-EXISTING STATUTORY TAX BENEFITS THROUGH EITHER INCOME AVERAGING OF PREFERENTIAL INCOME SUCH AS DEDUCTED CAPITAL GAINS (RILEY CASE), OR THE AVERAGING OF THE "ADD-ON" TAX UNDER THE PREDECESSOR SECTION %¢ (STOCKWELL CASE), WHEREAS IN THE APPELLANT S CAUSE, THE APPELLANT S STATUTORY RIGHT TO INCOME AVERAGING IS UNDISPUTED AS FOUND BY THE TAX COURT, AND APPARENTLY NOT DISPUTED IN THE CIRCUIT S RULING.

B. THE NINTH CIRCUIT S DECISION NEGATES THE APPELLANT S UNDISPUTED TAX SAVINGS PURSUANT TO THE INTERNAL REVENUE CODE (INCOME AVERAGING- Sec. 1301-1305) AND IS CONTRARY TO UNDISPUTED FINDINGS OF FACT AS

INCORPORATED IN THE DECISION OF THE TAX COURT, AND IS WITHOUT ANY S UPPORT IN THE RILEY AND STOCK-WELL CASES CITED IN THE TAX COURT AND CIRCUIT OPINIONS.

A(1) THE RILEY AND STOCKWELL DECISIONS, WHERE THE TAXPAYER ASSERTED NON-EXISTING STATUTORY CLAIMS OF DEDUCTED CAPITAL GAINS AND OR TAX, ARE W HOLLY INAPPLICABLE IN THE INSTANT CAUSE WHERE THE APPELLANT UNDISPUTEDLY HAS THE STATUTORY RIGHT TO INCOME AV-AGEING AND WHERE THE TAX COURT UNDISPUTEDLY HAS FOUND AS ITS FINDINGS OF FACT BY INCORPORA-TING IN ITS DECISION THE COM-PUTATION OF THE RESPONDENT IN-CLUDING A MODIFIED TREASURY DEPARTMENT SCHEDULE G (IN NAME OF THE APPELLANT) WHEREIN IT

IS COMPUTED THAT OF THE APPELL-
ANT S ADJUSTED GROSS INCOME OF
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INGS OF FACT, THE UNDISPUTED
COMPUTATION IN THE RESPOND-
ENT S SCHEDULE G (INCOME AV-
ERAGING) IN THE NAME OF AP-
PELLANT, WHEREIN IT IS FOUND
THAT OF THE SUM OF ADJUSTED
GROSS INCOME OF $ 97,432, THE
SUM OF $ 91,308 IS AVERAGEABLE

INCOME AND THAT $ 6,124 (30%
OF THE BASE PERIOD INCOME
$ 20,412) PLUS 20% ($16,202)
OF THE AVERAGEABLE INCOME,
TOTALS $ 24,326 WHICH IS
OBVIOSULY AVERAGE INCOME.

A(2)(B) THE CIRCUIT AND THE TAX COURTS HAD NO STATUTORY AUTHORITY THROUGH ANY INTERPRETATION OF SEC TION 55 TO NEGATE THE MANDATE OF THE STATUTORY IMPACT OF SECTION 1304 OF THE I.R. C. RESPECTING THE DESIGNATION OF THE INTERNAL REVENUE CODE WHERE THE INCOME AVERAGING PROVISIONS WERE INAPPLICABLE BUT NOT DESIGNATING SECTION 55 55 AS ANY SUCH SECTION.

(a) THE RULING OF THE CIRCUIT AND TAX COURTS HAVE

THE EFFECT OF LEGISLATING BY THEIR EXCLUSION OF SECTION 55 FROM THE IMPACT OF THE INCOME AVERAGING PROVISIONS (SEC. 1301-1305) WHICH OBVIOUSLY IS NOT THE PROVINCE OF THE COURTS TO INCREASE OR DECREASE STATUTORY IMPACT.

STATEMENT OF CASE

During a routine audit of the appellant's tax return for the year 1980, the appellee's computer, which apparently had not been programmed to provide for the inclusion of Treasury Department Schedule G (Income Averaging) in the determination of the alternative minimum taxable adjusted gross income to be included as a base f r the computation of the alternative minimum tax under Section 55 of the Internal Revenue Code, produced a computer print-out with respect to Section 55, supra, wherein there was excluded appellant's said Treasury Department Schedule G (Income Averaging) attached to appellant!tax form 1040, pursuant to the provisions of the Internal Revenue Code and the Regulation of the Secretary of the Treasury, promulgated pursuant to specific statutory authority whereby appellant elected to income average his adjusted gross income of $95,733 appearing in said Tax Form 1040, and in which said appellant's Schedule G (Income averaging), it was computed that of the

$ 95,732, the sum of $ 89,465 was averageable income, and as part of the computation of tax, therein, it was computed that $6,268 (30% of the base income) and 20% ($17,873) of the averageable income ($95,733) totaled $ 24,161, which is obviously the average income, and in place of the said sum of $ 24,161, the appellee's computer was programed to exclude the computation in said appellant's Schedule G (Income Averaging) and to insert, as in the determination of the adjusted gross income, not the said sum of $ 24,161, but the initial said sum of $ 95,732.00, thereby increasing the alternative minimum taxable income by the sum of $ 71,570, and thereby creating a alternative minimum tax of $ 17,947.60 and a tax deficiency of $ 18,255.70 and thereby negating and nullifying the tax saving of $ 18,276.90, and thereby increasing the appellant's

tax to $ 51,770, as though Schedule G (income averaging) never existed.

THE NEGATION AND NULLIFICATION OF THE APPELLANT s UNDISPUTED TAX BENEFITS UNDER THE INCOME AVERAGING PROVISIONS OF THE INTERNAL REVENUE C O DE UNDERLIES THE GRAVAMEN OF THE APPELLANT S COMPLAINT.

The appellant filed a petition with the United States Tax Court for a redetermination of the tax deficiency of $ 18,255.70 for the year 1980.

On April 24, 1986, the United States Tax Court filed its Memorandum Findings of Fact and Opinion, and thereafter the appellee filed its computation statement wherein there was included a modified Treasury Department Schedule G (Income Averaging) in the name of appellant, wherein it was computed that of the sum of adjusted gross income of $ 97,432, after deducting 30% ($ 6,134) from the

said adjusted gross income of $ 97,432, that the sum of $ 91,308 was averageable income, and that in computing the tax, the said sum of $ 6,138 plus $ 18,262 (20% of the averageable income of $91,308, totalled $ 24,386, which is obviously the aversge income, and significantly no other figure has been suggested by respondent-appellee.

Also included in the appellee·s said computation, was a c mputation of the alternative minimum tax, wherein there was inserted in handwriting, the sum of $ 95,732 in place of the aforesaid sum of $ 24,386 appearing in the said appellee·s Schedule G (income averaging) supra, thereby increasing the amount alternative minimum taxable income of the appellant to be used as the base for the computation of the alternative minimum taxable income by the sum of $71,346,

and thereby creating an alternative minimum tax of $ 18,957 and a tax deficiency of $ 18,255.70.

The United States Tax Court on August 14, 1985, entered its Order and Decision which states:

DECISION

> Pursuant to the opinion of the Court filed April 24,1985, and incorporating herein the facts recited in respondent's computation as the findings of the Court, it is
>
> ORDERED AND DECIDED: That there is a deficiency in income tax due from the petitioner for the taxable year 1980 in the amount of $ 18,255.70.
>
> (signed) W. M. DRENNEN
>
> Entered: August 14,1985

At this point it is to be noted that on January 27, 1986, in response to the notice from the appellee for the payment of the aforesaid sum of $ 18,255.70 and interest of $ 15,541.97, making a total of $ 33,706.77, the appellant under noted

protest sent his check for $ 33,706.77, wherein there was noted:

> "Paid under protest because of appeal in Ninth Circuit Court of Appeals."

and on appellee s printed demand received by appellant and returned by him with the aforesaid check, appellant wrote:

1/27/86

> "Notice and demand for payment of $ 33.706.77 received today. Because of pending appeal in United States Circuit Court of Appeals, Ninth Circuit, $ 33,706.77 is being paid under protest
> Samuel Okin "

Appellant duly filed his Notice of Appeal to the United States Court of Appeals for the for the Ninth Circuit on October 23, 1985 and the expiration of the period for the filing of the said appeal was October 12, 1985.

After the submission of briefs by the appellant and the respondent and on or about May 20, 1986, appellant received from the Clerk of the Circuit, a

notice, containing the following:

> "The United States Court of Appeals for the Ninth Circuit is considering submission of your case without argument. Pursuant to Ninth Circuit Rule 3(f), you have ten (10) days from the receipt of this letter to present a statement setting forth the reasons why oral argument should be heard in this case. Please send an original and three (3) copies of your statement to the Clerk's Office in San Francisco, and show proof of service on opposing counsel.
>
> The court welcomes additional citations, without oral argument, of relevant decisions rendered since filing of a party's last brie Rule 28(3) of FRAF). Send an original and three (3) legible copies to me, on letter size paper, with proof of service on all parties."

In response to the foregoing and within the said 10 day period, appellant filed with the Ninth Circuit, the following:

> " APPELLANT'S STATEMENT UNDER RULE 3(f) OF NINTH CIRCUIT IN REPLY TO CLERK S NOTICE UNDER SAID RULE RECEIVED ON MAY 31, 1986
>
> The appellant respectfully objects to any submission of this appeal without oral argument in

that appellant contends that such procedure will be highly prejudicial to the appellant's appeal.

Appellant respectfully states that the many aspects of the appellant's opening and reply briefs (totaling 45 pages) evidence the many reasons why there should be oral argumentof the appeal thereby particularly enabling the appellant to buttress the contents of the said briefs, and also thereby affording the appellant an opportunity to appear before the Court and answer any question respecting the appeal which the oral argument may cause to emanate from the Court.

It is the contention of appellant that oral argument is an integral part of the appeal and that the submitted briefs are not a substitute for oral argument.

Another phase of this appeal which appellant contends necessitates oral argument,is the appellant's assertion in his briefs of the contingent question of the constitutionality of Section 55 of the Internal Revenue Code, which appellant contenfs resulted from the Tax Court's opinion and decision, and which appellant intended to support during the oral argument.

Appellant contends that oral argument is an integral part of due process of appellate procedure and that the elimination of oral argument raises the constitutional question

question of a violation of the due process clause of the United States Constitution.

Finally, appellant asserts that the sum of $ 18,255.70, which the Tax Court determined to be a tax deficiency for the year 1980, should because of the large amount, warrant oral argument of this appeal.

CONCLUSION

Appellant respectfully asks that there be oral argument of this appeal.

Respecfully submitted

Samuel Okin,
Petitional-Appellant
#241 Sands Avenue,
Las Vegas, Nevada,
702-735-0884 "

Thereafter under date of August 20, 1986, appellant received from the Clerk of the Circuit Court, a letter containing the following:

"Upon due consideration of your objection to submission of this case without oral argument, the Court has decided that oral argument is not necessary.

On August 12, 1986, your case was submitted for decision to Judges Tang, Ferguson, and Hall,CJJ, you will be promptly notified by mail when the case id decided."

The Circuit Court Clerk thereafter sent to appellant a copy of the decision of the Circuit Court dated the 26th day of January, 1987.

Because the said Circuit decision affirming the order of the Tax Court, used the term "Do Ordered" at the conclusion thereof, and appellant being uncertain as to whether under the Ninth Circuit procedure a formal order is entered, appellant duly served and filed a notice of appeal in the Circuit Court to the United States Supreme Court from the said order and decision of the Circuit Court affirming the decision of the said Tax Court.

Thereafter appellant received from the Clerk of the Circuit Court, a copy of a letter from the said Clerk of the Circuit Court to the Clerk of the United States Tax Court, wherein the said Clerk referred to the inclusion of a "decree"

of the Circuit Court, w hich said letter was dated February ;7, 1987. Appellant telephoned the office of the Clerk of the Circuit Court, and asked for a copy of the said Decree of the Circuit Court, and was told that appellant would have to ask the Clerk of the Tax Court for a copy, and upon further imquiry was informed that the decree was dated February, 1987.

In order to avoid any possible default respecting the proper identification and date of the order of the Circuit Court, appellant duly served and filed an Amended Notice of Appeal in respect to a Circuit Court decree in this cause dated February 17, 1987. Promptly appellant telephoned the Clerk of the Tax Court amd requested a copy of the "decree" of the Circuit Courtin this cause. Subsequently, appellant received from the

Clerk of the Tax Court, a document of the Circuit Court in this cause, dated and entered on January 26, 1987, titled a "JUDGMENT" of the Circuit Court for the Ninth Circuit.

While appellant believed that the appellant's original Notice of Appeal which referred to the Order and Decision of the Circuit Court, probably was sufficient, nevertheless in order to be absolutely accurate, appellant duly and promply served a second amended Notice of Appeal referring to an appeal from the Judgment of the United States Court of Appeals for the Ninth Circuit, which affirmed the order and decision of the United States Tax Court (supra).

Appellant respectfully states that he believes that the unusual circumstances on this case, which necessitated the service snd filing of not only the

the Notice of Appeal to the Supreme Court of the United States, but also the service and filing of an amended and second amended notice of appeal.

THE QUESTIONS ARE SUBSTANTIAL.....

A. THE NINTH CIRCUIT S DECISION NEGATES THE APPELLANT S UNDISPUYED TAX SAVINGS PURSUANT TO THE INTERNAL REVENUE CODE (SEC. 1301-1305, AND IS CONTRARY TO THE UNDISPUTED FINDINGS OF THE TAX COURT AND WITHOUT ANY SUPPORT IN THE RILEY AND STOCKWELL CASES CITED IN ITS DECISION.....

(1) THE TAX COURT·S ORDER INCORPORATES THEREIN THE FACTS RECITED IN RESPONDENT·S COMPUTATION AS THE FINDINGS OF THE COURT

(a) THE SAID COMPUTATION OF THE RESPOMDEMT INCLUDES A MODIFIED TREASURY DEPARTMENT

SCHEDULE G (INCOME AVERAG-
ING) IN NAME OF THE APPELL-
ANT-TAXPAYER. WHEREIN IT IS
FOUND THAT OF THE ADJUSTED
GROSS INCOME OF APPELLANT
FOR THE TAXABLE YEAR 1980
IN THE AMOUNT OF $ 97,432,
THE SUM OF $ 91,308 IS AV-
ERAGEABLE INCOME AND THAT
IN THE COMPUTATION OF TAX
IT WAS COMPUTED THAT $6,124
(30%) OF THE TOTAL $20,412
OF THE BASE PERIOD INCOME
PLUS 20% OF THE AVERAGEABLE
INCOME $ 18,262, TOTALS
$ 24,386 (WHICH APPEARS TO
BE THE AVERAGE ADJUSTED
GROSS INCOME)

(2) THE NINTH CIRCUIT S DECISION
IS CONTRARY TO SECTION 1304
OF THE INTERNAL REVENUE CODE

WHICH PRESCRIBES WHAT PROVISIONS OF THE INTERNAL REVENUE CODE INCOME AVERAGING IS INAPPLICABLE (NOT INCLUDING SECTION 55

(3) THE NINTH CIRCUIT S DECISION CITING THE RILEY AND STOCKWELL DECISIONS IS NOT SUPPORTED AS THE SAID RILEY AND STOCKWELL DECISIONS ARE WHOLLY DISTINGUISHABLE AS INVOLVING THE TAXPAER S ATTEMPT TO OBTAIN NONEXISTING STATUTORY TAX BENEFITS THROUGH INCOME AVERAGING, WHEREAS IN THIS CAUSE THE APPELLANT·S STATUTORY RIGHT TO INCOME AVERAGING IS UNDISPUTED AS FOUND BY THE TAX COURT.

The Tax Court's order states:

> "Pursuant to the opinion of the Court filed April 24, 1985, and incorporating herein the facts recited in respondent's computation as the findings of the Court, it is
>
> * * *

The respondent;s said computation dated July 2, 1985, included a modified Schedule G (Income Averaging) in the name of appellant, wherein it is stated:

COMPUTATION OF AVERAGEABLE INCOME

&.	Taxable income for 1980 from Schedule TC (Form 1040). Part 1, line 2,,,,,,,,,,,,,,,,,,,,	$97,432
11	Adjusted taxable income.....	97,432
12	Add columns (a) through (d) line 6.....	20,412
13	Enter 30% of line 12.....	6,124
14	Averageable income (subtract Line 13 from line 11)....	91,308

COMPUTATION OF TAX

15	Amount from line 13		6,124
16	20% of line 14.....		18,262
17	Total (add lines 15 and 16).		24,386
19	Total (add lines 17 and 18).		24.386
20	Tax on amount on line 19 ..		7,088
21	Tax on amount on line 17	$7,088	
22	Tax on amount on line 15	739	
23	Subtract line 22 from line 21.....	6,349	
24	Multiply the amount om line 23 by 4.....		26,396
28	Tax (add lines 20 and 24		32,484

Internal Revenue Code (sec. 1305) stated:

" Regulations- The Secretary shall prescribe such Regulations as may be necessary to ca rry out the purposes of this part."

The Regulation of the Secretary of the Treasury promulgated pursuant to specific statutory authority vested in him, stated:

"CHOICE OF INCOME AVERAGING BY TAXPAYER

(a) Choice by taxpayer. The income averaging provisions apply to the taxable year only if the taxpayer chooses to have the benefits of income ave raging for such taxable year. The taxpayer shall signify his choice by making jis return for the computation year on form 1040 and attaching Schedule G, Income Averaging thereto."

It is undisputed that the appellant , in compliance with the foregoing statutory provisions, made his tax return on Tax Form 1040 and attached thereto Treasury Tax Form Schedule G, Income Averaging (both said Form 1040 and SChedule G (Income Averaging) are part of Exhibit A.

At this point, because of its importamce, appellant repeats w hat he said previously respecting the provision in the Tax

Court s decision and order incorporating the computation of the respondent as the findings of the Court, which computation included a modified Schedule G (Income Averaging) in the name of appellant, referred to at length, supra, wherein the averagable oncome of the appellant's adjusted gross income was ncluded as well as a computation under a formila whereby the average income was determined as part of the computation of the tax in the said Schedule G.

Section 1304 of the Internal Revenue Code stated:

(a) Taxpayer must choose benefits. This part shall apply to the taxable year only if the taxpayer chooses to have the benefits of this part for such taxable year.

(b) Certain provisions inapplicable.

If the taxpayer chooses the benefits of this part f.r the taxable year, the following provisions shall not apply to him for such year

(1) Section 911 (relating to citizens or residents of the United States living abroad) and

(2) Subpart D of part III of subchapter N(sec. 931 and following, relating to income from sources within the United States).

At this point it is to be significantly noted that neither yhe Circuit Court nor the Tax Court in their opinion discuss the statutory impact of the forefoing Section 1304 respecting the subject of the inapplicability of the income averaging provisions of the Internal Revenue Code in seeking to sustain the exclusion of the income averaging provisions from the determination of the alternative minimum taxable income, by the respondent. initially in his computer print-out, where no provision, apparently, was made in the programing for income averaging, so that in the absence of any regulation of the Secretary of the Treasury respecting Section 55 of the

Internal Revenue Code, the person making the computation print-out, proceeded as though Schedule G of the Treasury Department , supra, never existed, and the computer print-out issued a computation of alternative minimum tax based on the original adjusted gross incomeof $ 95,732, instead of the average income of $24,386. thereby increasing the alternative minimum taxable income by the sum of $71,346 and creat ing an alternative minimum tax of $ 18,957 and a deficiency tax of $ 18,255.70, and thereby the appellant s undisputed Congressional Tax Bene fits of $ 18,276.90 has been negated and the appellant is compelled to pay total taxes of $ 51,770 instead of $ 33,493.10, just as any taxpayer who has no statutory right to elect to income average his adjusted gross income but has the same a djusted gross income.

The Circuit Court s opinion, as well as the Tax C ourt rely on their interpretation of the language of Section 55 of the Internal Revenue Code to support their conclusion that the Income Averaging provisions are not applicable because the said Section 55 is referred to as an additional tax with provisions which are in the Court·s opinion separate whereas the Tax Court interpreted them to be separate and "imposed and co,puted independently.

Appellant contends that the fact that Section 55 was a separate sec t ion of the Code or the fact that the said Section 55 created an an additional tax with its own formula for the computation of the tax, dpes not make the said provisions of Section 55 , either separate or independent of the balance of the Internal Revenue Code, in effect segregating the said Section 55 from the other sections of the Internal Revenue Code.

It is appellant s contention that every section of the Internal Revenue Code, when necessary is interwoven with a l l the other sections of the Code and that str ct statutory interpretation, in the acsence of any contrary statutory language, nrvrddiyayes a statutory interpretation that all of the sections of the Internal Revenue Code, be interpreted consistent with each other.

It is impotyant to note, at this point that no where in either the opinion of the Circuit or the Tax Court, is there any reference to the legislative history of the enactment of said Section 55 or its predecessor section 56, to the fact that there ever was the s lightest intent intent on the part of Congress, or the Congressional Committees who drafted the lefislation respecring Section 55 or 56, to negate the tax benefits of the income averaging provisions of the

Internal Revenue Code. Actually and decisively, the fact that Section 1304 did not exclude section 55 from the applicability of the income averaging provisions from the interpretation or impact of section 55, it is difficult for the appellant to understand how the Circuit Court and Tax Courtcould conclude that the income averafing provisions are inapplicable to the interpretation of Section 55.

The appellant contends that the Riley and Stockman cases, where the taxpayer sought to establish n on-existing statutory right to income averaging, are no support for th e said Courts conc lusions.

Appellant notes that both Circuit Court and the Tax Court cite reference to text in Bittker, Federal Taxation of Income, Estates and Gifts, secs. 111,511, 111,3.2 (1981), neither discission refers to Beckman v. United States, 306 Fed. Supp

44, where the Court said (p.50):

"The purpose of Section 1301 is to ease abnormal tax burdens created by receipt of long-term compensation received in one year by allocating such bunched income over the period in which it was earned. Payne v. United States (Ct. Cls. 1974) 409 F. 2d 1404, 1406. The statute is intended to put the taxpayer, if he makes this choice, in essentially the same position as if the fee (or earnings) had been earned ratably during each of the years. United States v. Behle (10 Cir. 1963, 310 F. 2d 134, 136."

(emphasis supplied)

The Circuit Court says (p.7):

"3. Purpose of Alternative Minimum Tax:

(2) I. R. C. 1301-1305 allow income averaging for 'the tax imposed by section 1.' Income averaging is designed to ease the burden of a progressive tax rate-schedule on a taxpayer with widely fluctuating or rapidly rising income. 4 B Bittker, supra, 111.3.13, at 111.70. The provisions do not alter the taxpayer's income for the given year. Rather they reduce the rate at which that income is taxed. Thus, in a case such as Okin's, where a large capital gain is realized in one year, the provisions lower the tax rate in a compensatory fashion to equal, ideally, the rate(s) that would have applied had the income been spread evenly over the proceeding base period

years and the tax year in question. See generally id. "

THE FOREGOING PORTION OF THE CIRCUIT COURT'S OPINION THUS RAISES AT THIS TIME THE STATUTORY QUESTION OF THE IMPACT OF THE STATUTORY SCHEDULE G BY APPELLANT PURSUANT TO THE INTERNAL REVENUE CODE (supra

IT IS TO BE SIGNIFICANTLY NOTED, AGAIN, THAT THE LEGISLATIVE HISTORY OF THE CONGRESSIONAL ENACTMENT OF SECTION 55 DOES NOT INDICATE THE SLIGHTEST INTENT ON THE PART OF CONGRESS TO NEGATE THE TAX BENEFITS OF SECTIONS 1301-1305OF THE INTERNAL REVENUE CODE BY THE ENACTMENT OF SECTION 55. PREFERENTIAL INCOME, SUCH AS CAPITAL GAINS WERE THE TARGET OF THE ENACTMENT OF SECTION 55 AND NOT A COLLATERAL ATTACK ON THE STATUTORY TAX BENEFITS OF ELIGIBLE TAXPAYERS.

THE APPELLANT CONTENDS THAT SCHEDULE G OF THE TREASURY DEPARTMENT WAS DESIGNED

TO CREATE A MECHANISM BY WHICH THE SUBJECT TAX RETURNS OF AN ELIGIBLE TAXPAYER WOULD BE MODIFIED WITH THE SAME FORCE AND AS THOUGH THE SUBJECT TAX RETURNS WERE ACTUALLY AMENDED.

CONGRESS INTENDED TO SUBJECT DEDUCTED CAPITAL GAINS (PREFERENTIAL INCOME TO SOME TAX, BUT NOT TO NEGATE THE STATUTORY TAX BENEFITS OF INCOME AVERAGING.

THUS IT IS TO BE NOTED THAT A TAXPAYER WITH THE SAME ADJUSTED GROSS INCOME AND THE SAME PREFERENTIAL INCOME (CAPITAL GAINS) BUT NO STATUTORY RIGHT TO INCOME AVERAGING, WOULD PAY HARDLY ANY ALTERNATIVE MINIMUM TAX.

APPELLANT OBSERVES THAT THE FOREGOING REFERENCE TO THE CIRCUIT COURT S OPINION, SUPRA, APPEARS TO INDICATE THE QUESTIONING BY THE CIRCUIT COURT OF THE UNDISPUTED FINDINGS OF FACT OF THE TAX COURT RESPECTING THE RESPONDENT S COMPUTATION

CONTAINING A MODIFIED TREASURY DEPARTMENT SCHEDULE G (INCOME AVERAGING) WHEREIN IT IS COMPUTED, UNDISPUTEDLY, THAT $91,308 OF THE APPELLANT S A JUSTED GROSS INCOME OF $ 97,432 IS AVERAGEABLE INCOME.

APPELLANT CONTENDS THAT THE CIRCUIT COURT HAS NO STATUTORY POWER TO REVIEW THE FOREGOING UNDISPUTED FINDINGS OF FACT OF THE TAX COURT, AND THAT THE FOREGOING EXPRESSION OF THE CIRCUIT COURT IN ITS OPINION RESPECTING THE PRO RATING OF INCOME, IS WITHOUT STATUTORY FOUNDATION.

IT IS SUBMITTED THAT THE FINDINGS OF THE TAX COURT AS REFLECTED IN THE SAID RESPONDENT S COMPUTATION INCLUDING A MODIFIED SCHEDULE G, IN THE NAME OF APPELLANT, COMPUTING WHAT APPEARS TO BE AVERAGE INCOME $24,386, IS BEYOND ANY STATUTORY REVIEW BY THE CIRCUIT COURT.

THE COURT OF APPEALS, AS DID THE TAX COURT, CITE THE RILEY AND STOCKWELL CASES

TO SUPPORT THE EXCLUSION OF THE TAX COURT'S DETERMINATION RESPECTING THE UNDISPUTED COMPUTATION OF AVERAGEABLE INCOME AND SAID AVERAGE INCOME. THE RILEY AND STOCKWELL CASES ARE WHOLLY DISTINGUISHABLE, IN THAT IN BOTH CASES THE TAXPAYER SOUGHT TO ESTABLISH NON-EXISTING STATUTORY BENEFITS OF UNCOME AVERAGING, WHICH THE COURT REJECTED.

IN THE CAUSE BEFORE THE COURT, IT IS UNDISPUTED THAT THE APPELLANT HAS THE UNDISPUTED STATUTORY RIGHT TO ELECT TO INCOME AVERAGE HIS ADJUSTED GROSS INCOME, AND THAT THE APPELLANT DULY ELECTED TO EXERCISE THAT ELEVTION, AND THE ELECTION AND IMPACT OF SAID ELECTION (SCHEDULE G - INCOME AVERAGING) CANNOT BE THE SUBJECT OF ANY REVIEW BY THE CIRCUIT COURT.

IT IS TO BE SIGNIFICANTLY NOTED THAT THE INTERNAL REVENUE CODE SPECIGICALLY EMPOWERS <u>ONLY</u> THE TAXPAYER, WITHIN A SPECIFIED TIME TO TERMINATE SUCH ELECTION.

AND IN EFFECT THE LOWER COURTS HAVE TERMINATED THE SAME.

A(1) THE RILEY AND STOCKWELL DECISIONS, WHERE THE TAXPAYER ASSERTED NON-EXISTING STATUTORY CLAIMS OF AVERAGING OF DEDUCTED CAPITAL JAINS AND TAX, ARE WHOLLY INAPPLICABLE IN THE INSTANT CAUSE WHERE THE APPELLANT UNDISPUTEDLY HAS THE STATUTORY RIGHT TO INCOME AVERAGING AND WHERE THE TAX COURT UNDISPUTEDLY HAS FOUND AS ITS FINDINGS OF FACT BY INCORPORATING IN ITS DECISIONS THE COMPUTATION OF THE RESPONDENT INCLUDING A MODIFIED TREASURY DEPARTMENT SCHEDULE G (IN NAME OF APPELLANT) WHEREIN IT IS COMPUTED THAT OF THE APPELLANT;S ADJUSTED GROSS INCOME OF $ 97,432, <u>THE SUM OF $ 9k,308. IS AVERAGEABLE INCOME</u>.

At the outset. appellant emphasizes the issue before the Court in the instant

cause, is not the deducted capital gains, which are preferential incomeand the subject of taxation under section 55 of the Internal Revenue Code, but rather the negating of the statutory impact of the income averaging of the adjusted gross oncome as f und by the Tax Court.

At no time jas the appellant contended thst sny psrt of the deducted capital gains ($ 136,030.80) is averageable and the Circuit Court opinion refers to the entire amount of $ 136,030.80, which is preferential income subject to the providions of Section 55 of the Internal Revenue Code.

This appeal poses the substantial question as to whether the Circuit Court and the Tax Courterred in excluding the undisputed findings of fact as incorporated in the Tax Court's Decisions respecting the compuattion of averageable income of the appellant which was excluded by the Circuit Court and the Tax Court in the

determination of the adjusted gross income to be included in the computat on of the alternative minimum taxable incomeunder Section 55 of the Internal Revenue Code; and contrary wise, by the inclusion of the initial adjusted gross income of $97,432. be f ore income averaging, instead of the average income of $ 24,386, as appears in the a foresaid respondent s Schedule G (Income Averaging), incorporated in the Tax Court s Decision, as its findings of fact (supra), thereby increasing the alternative minimum taxable income by the sum of $ 73,046 and thereby creating an alternative minimum tax of $ 18,957 and a tax deficiency of $ 18,255.70.

A(2) THE CIRCUIT COURT S RULING IMPLIES A CONCEPT OF SEGREGATION OF SECTION 55 OF THE I.R.C. IN ITS INTERPRETION OF SECTION 55 AS SEPARATE.

The Circuit Court said (p.6):

"Okin maintains that his alternative minimum tax should be computed not by starting with $ 99,432, the figure representing adjusted gross omcome, but rather with $ 25,105.28 w hich Okin refers to as his average annual adjusted gross income. This $ 25,105 figure is derived from Okin's computation of his section 1 tax under the income averaging provisions of sections 1301-1305.

(1) Okin's interpretation is incorrect.By the plain ,eaning of its text, the alternative minimum tax provision applirs 'in addition' to other provisions. I.R.C. sec.55. The income averaging provisions by by their terms, apply only to the ta x imposed by section 1. The pro-provisions are therefore separate. The reference to gross income in section 55(b)(1) in unambiguous, it does not refer to section 1301-1305, vice-versa. Also, the provisions of sections 1301-1305 could have no effect on ;gross income; because the income averaging provisions intended to adjust the rate of taxation, not the amount OF GROSS INCOME. See, generally 4 B Bittker, Federal Taxation of Income, Estates and Gifts. sec.111.3.13* 191."

(emphasis supplied)

"The forms themselves support this analysis. For 1980, form 6231 was used for computation of alternaminimum tax, on line 1, the adjusted gross income correspondents with form 1040 line 12, which is the adjusted gross income prior to calculation of income averaged income."

A(2)(A) THE CIRCUIT COURT'S RULING PURPORTS TO REVIEW THE UNDISPUTED FINDINGS OF FACT OF THE TAX COURT WHEN IT ONCORPORATED IN ITS DECISION AS ITS FINDINGS OF FACT, THE UNDISPUTED COMPUTATION IN THE RESPONDENT S SCHEDULE G (INCOME AVERAGING) IN THE NAME OF APPELLANT, WHEREIN IT IS FOUND THAT OF THE SUM OF ADJUSTED GROSS INCOME OF $ 97,432, THE SUM OF $ 91,308 IS AVERAGEABLE INCOME AND THAT $ 6,124 (30% OF THE BASE PERIOD INCOME ($ 20,412 PLUS 20% ($18,262) OF THE AVERAGEABLE INCOME, TOTALS $ 24,386, OBVIOUSLY AVERAGEABLE INCOME.

The foregoing, appellant contends, wholly distinguishes the Stockwell and Riley decisions from the questions posed on this appeal.

In Stockwell v. C. I. R., 730 F.2d 1051, the Court said (p. 1051):

> " This appeal poses the question whether the minimum tax imposed on individual tax preference items under former section 56 (now ORC section 55, USC sec. 55), is subto the income averaging provisions of IRC secs. 1301-1305, 26 U.S.C. secs. 1301-1305. The Commissioner determined that the averaging provisions did not apply. The Tax Court agreed. We affirm.
>
> * * *
>
> In computing their taxable income for 1978, the Stockwells averaged their income under sections 1301-1305. They also averaged the minimum tax on the tax preferemce items."

and further (pp. 1051-1052):

> "The Stockwells took the issue to the Tax Court which upheld the Commissioner's determination of defiency on the basis of its previous ruling in Riley v. CIR. 66 T.C. 141 (1976). The question is one of first impression.
>
> For purposes of Sec. 56. capital gains are items of tax preference.

and further (p. 1052):

> "For purposes of this part, the items of tax preference are -
>
> * * *
>
> Capital gains.
>
> Income averaging, a legislative tax grace, permits of a spreading of income to levelout peak years.
> ....."

(emphasis supplied)

IT IS UNQUESTIONABLY CLEAR FROM THE FOREGOING THAT THE COURT REJECTED THE TAXPAYER S CONTENTION OF A NON-EXISTING STATUTORY RIGHT TO AVERAGE THE MINIMUM TAX ON TAX PREFERENCE ITEMS AND NOT THE APPLICATION OF INCOME AVERAGING.

In appellant's cause, there is no question of any contention that the minimum tax on the tax preference items is to be averaged. Consequently the Circuit Court and the Tax Court erred in asserting the Stockwell decision as support for their decisions.

In Riley v. Commissioner (66 T.C. 141, (1976), the Court said:

> "Sections 1301-through 1305 do not provide a mechanism by which the minimum tax on tax preference income can be averaged."

It is crystal clear from the foregoing that in both the Stockwell and Riley decisions, the question poseed was whether the statute permitted the averaging of the tax on tax preference items which were the subject of the "add-on" tax under section 56 of the Internal Revenue Code and not subject of an additional tax under section of the Internal Revenue Code.

Obviously there is <u>not</u> the slightest comparision to the question posed on this appeal respecting the exclusion by the Circuit Court , as well as the Tax Court of the undisputed findings of fact of the Tax Court, when it incorporated in its decision, the respondent s appellee's computation, wherein there was included a modified Treasury Department Schedule G

(in name of appellant), wherein it was undisputedly computed that of the appellant's adjusted gross income of $ 97,432, the sum of $ 91,308 was averageable income, and that 30% ($6,124) of the base period income of $ 20,412, plus 20% (%18,202) of the averageable income of $ 91,308, totals $ 24,386/, which is obviously average income , by the Treasury Department formula.

Simple mathamatics would compute the average as one-fifth of the total($117,844) of the averageable income of $ 91,303 plus the 30% (6,124 of the base income), resulting in a figure of $ 23,568, the diference being the deducted 30%.

The Circuit Court said (p.6):

" The gramen of Okin's complaint is that the Commissionser's computation under I. R. C. sec. 55 virtually nullify his tax savings under the income averaging provisions. In this case section 55 does have that effect. But this result is not contrary to congressional intent. Although section

55 increases Okin's total tax, his capital gain deductions overall decreased his total liability under sections 1 and 55 by almost one-third of what it would otherwise have been. Thus, both congressional concerns in enacting section 55- tax on gains and incentuve for capital formation are served. See 4 B. Bittker, supra p.5 sec.1111.3.12, at 1111.67 to 68.

* * *

5 The Tax Court noted that Okin's section tax computed without income averaging would be $ 51,770 instead of $ 33,493.10. Thus on his section 1 taxes, Okin would save $ 18,276.90 by income averaging . However, his tentative alternative minimum tax as computed by the Commissioner is $ 51,440.70. Since this amount is imposed to the extent that it exceeds the regular tax, Okin's total liability (regular and alternative minimum tax) would be $ 51,770 without incpme averaging, compared with $ 51,440.70 with income averaging. Hence, the effect of the imposition of the alternative is that by income averagingOkin saves only $ 329.30 instead of $ 18,276.90. See Okin 49 T. C. M. (CCH) at 1318.n.10)."

(emphasis supplied)

IT IS IMPORTANT TO NOTE THAT NO WHERE IN THE OPINIONS OF EITHER THE CIRCUIT Court or the Tax Court IS THERE ANY REFERENCE TO THE LEGISLATIVE REPORTS OF THE CONGRESSIONAL COMMITTEES WHICH ACCOMPAN-

IED THE ENACTMENT OF SEC. 55 OF THE INTERNAL REVENUE CODE, TO SUPPORT THE CONCLUSIONS OF THE CIRCUIT COURT AND THE TAX COURT THAT SECTION 55 WAS INTENDED TO NULLIFY AND NEGATE THE STATUTORY IMPACT OF TAX SAVINGS UNDER THE INCOME AVERAGING PROVISIONS BY THE ENACTMENT OF SAID SECTION 55 OR THAT THE PROVISIONS OF SECTION 1304 OF THE INTERNAL REVENUE CODE, RESTRICTING THE INAPPLICABILITY OF THE INCOME AVERAGING PROVISIONS WERE TO INCLUDE THE ABSENT REFERENCE TO SEC. 55.

THE AVERAGEABLE INCOME OF $ 91,208, TOTALS $ 24,386, WHICH APPELLANT CONTENDS IS THE AVERAGE INCOME FOUND BY THE TAX COURT

Appellant contends that these undisputed findings of the Tax Court are not reviewable by the Circuit Courtand that on this appeal no question is posed respecting the finding that $ 91,308 of the appellant's a djusted gross income of

$ 97,432 is averageable income or that $ 24,386 is AVERAGEABLE INCOME.

A(2)(b) APPELLANT CONTENDS THAT THE IMPOSITION OF A PARTICULAR OR ADDITIONAL TAX (SEC. 55), DOES NOT ALTER THE UNDERLYING UNDISPUTED FINDING OF FACT BY THE TAX COURT OF THE AVERAGEABLE INCOME.

It is appellant's contention when appellant, pursuant to statute, elected to average his income by attaching his Treasury Department Schedule G (Income Averaging) to his tax form 1040 for the year 1980, that the income of the appellant for the computer year(1980) and the base four years, was forthwith averaged and remain averaged subject to the statutory right of the taxpayer to terminate the election within the statutory period.

Appellant contends that Treasury Department Schedule G, is a statutory mechanism

conceived by the Treasury Department pursuant to its statutory authority to effectuate a consolidated modification of the subject tax returns to reflect income averaging without the necessity of physically amending the subject tax returns but having the statutory impact.

It is appellant's contention that the Circuit Court's ruling that:

> "...Also, the provisions of sections 1301-1305 could have no effect on 'gross income' because the income averaging provisions are intendedto adjust the rate of taxation, not the amount of gross income....."

is contrary to the opinion in Beckman v. v. United States, 396 Fed. Supp. 44,50 where the Court said (p.90):

> "The purpose of sec. 1301 is to ease abnormal tax burdens created by receipt of long-term received in one year by allocating such 'bunched' income over the period in which it was earned . Payne v. United States (Ct. Cls. 1974) 469 F. 2d 1404,1406. The statute is intended to put the taxpayer, if he makes choice, in essentially the same position as if the fee (or earnings) had been earn-

ed ratably during each of the years. Uniedv. Behle, (10 Cir. 1963, 310 F. 2d 134, 136)."

(emphasis supplied)

IN ANY EVENT, IT IS THE APPELLANT S CONTHAT THE UNDISPUTED FINDINGS OF THE TAX COURT RESPECTING THE COMPUTATION OF AVERAGEABLE INCOME, IS CONTROLLING AND THAT THE CIRCUIT COURT HAD NO STATUTORY POWER TO REVIEW THE SAID FINDINGS OF FACT (SUPRA).

A(1)(B) THE CIRCUIT COURT S RULING INFERING THE CONCEPT OF SEGREGATION IN ITS INTERPRETATION OF SECTION 55, AS SEPARATE, TO SUPPORT ITS RULING RESPECTING THE EXCLUSION OF THE INCOME AVERAGING PROVISIONS FROM THE COMPUTATION UNDER SECTION 55 OF THE ALTERNATIVE MINIMUM TAX, IS CONTRARY TO THE STATUTE AND THE UNDISPUTED FINDINGS OF THE TAX COURT.

Section 1304 of the Internal Revenue Code states:

"SPECIAL RULES

(a) TAXPAYER MUST CHOOSE BENEFITS- This part shall apply to the taxpayer only if the taxpayer chooses to have the benefit of this part for such taxable year. Such choice may be made or changed at any time before the expiration of the period prescribed for making a claim for credit or refund of the tax imposed by this chapter f r the taxable year.

(b) CERTAIN PROVISIONS INAPPLICABLE. If the taxpayer chooses the benefits of this part, the following provisions shall not apply to him for such year:

(1) Section 911 (relating to citizens or residents of the United States living abroad).

(2) Subpart b of Part III of subchapter N (sec. 931 and following, relating to income from sources within possessions of the United States.

* * * "

To refute the ruling of the Circuit Court that Section 55 is separate, appellant has annexed as Appendix G, that part of the Conference Report of the Congressional Committees respecting the enactment of the Alternative Minimum Tax for non-corporate taxpayers, which appellant

contends demonstates that Section 55 of the I.R.C. is not "separate" but that on the contrary that it is highly involved with many of the other sections of the Internal Revenue Code.

With respect to the interpretation of the Circuit Court that Section 55 is "separate" tax, it is to be noted that the said conference report states (Appendix G, p. 264):

> "Where the alternative minimum tax exceeds the regular tax, no credits generally will be allowable against the alternative minimum tax liability. However, certain refundable credits will be allowed against the alternative minimum tax (i.e., the credit for withheld taxes, the credit for refunds of gasoline and other fuel taxes, and the earned income credit), because the amounts involved would be available as refunds to the taxpayer in any event.
>
> Senate amendment- The senate amendment repeals the present minimum tax for individuals beginning in 1979 and establishes an alternative minimum tax, under which a taxpayer pays the alternative minimum tax only where it exceeds the taxpayer s regular income tax.

Generally, the tax base for the alternative minimum tax is taxable income plus the taxpayer s preference items for the year.

* * *

The amount of minimum tax is the amount by which the tax computed under this rate schedule exceeds the taxpayer s regular tax. Thus, although the tax is in effect a true alternative tax, in the sense that it is paid only when the amount computed under the schedule exceeds regular tax, technically the taxpayer s regular tax continues to be imposed and the amount of the alternative minimum tax is the excess of the amount computed under the minimum tax rate table over the amount of the regular tax."

(emphasis supplied)

IN THE LIGHT OF THE FOREGOING STATEMENTS IN THE AFORESAID CONGRESSIONAL CONFERENCE REPORT, IT WAS ERROR FOR THE CIRCUIT COURT AS WELL AS THE TAX COURT TO INTERPRET SECTION 55 OF THE INTERNAL CODE TO BE A SEPARATE TAX, SEPARATE AND APART FROM THE INCOME AVERAGING PROVISIONS AND THAT IN THE COMPUTATION OF ALTERNATIVE MINIMUM TAXABLE INCOME UNDER SECTION 55, THAT THE COMPUTATION IN APPELLEE s REVISED SCHEDULE G IN THE NAME OF APPELL-

ANT, INCORPORATED IN THE TAX COURT S DE CISIONS COULD BE EXCLUDED AND THAT THE COMPUTATION OF ADJUSTED GROSS INCOME COULD BE MADE WITHOUT INCLUDING THE FIND-INGS OF THE TAX COURT RESPECTING AVERAGE-ABLE INCOME, AND THAT IT WAS ERROR FOR THE LOWER COURTS TO MAKE A COMPUTATION AS THOUGH SAID SCHEDULE G, NEVER EXISTED, AND THE TAX COURT HAD NOT MADE THE FIND-INGS.

IT IS TO BE SIGNIFICANTLY NOTED THAT THE STOCKWELL AND RILEY CASES REFERRED TO BY THE TAX COURT AND THE CIRCUIT COURT MERELY RULED THAT THEY REJECTED THE NON-EXISTING STATUTORY CLAIMS OF THE TAX-PAYERS(THE RILEY CASE INVOLVING A NON-EXISTING CLIAM TO INCOME AVERAGING , AND THE STOCKMAN CASE INVOLVING A NON-EXISTING ~~CLA~~IM TO THE AVERAGING OF THE MINIMUM TAX UNDER THE OLD SECTION 56 (THE PREDECESSOR OF THE SAID SECTION 55).

APPELLANT EMPHASIS THAT IN NEITHER THE STOCKMAN NOR THE RILEY CASE DID THE COURT NEGATE THE STATUTORY IMPACT OF THE INCOME AVERAGING PROVISIONS OF THE INTERNAL REVENUE CODE.

APPELLANT CONTENDS THAT THE CIRCUIT COURT IN THE INSTANT CAUSE GOES FAR BEYOND THE RULINGS OF THE RILEY AND STOCKMAN CASES, AND THAT THE CIRCUIT COURT SUPPORTS COLLATERAL ATTACKS ON DIFFERENT PROVISIONS OF A STATUTE BY AN INTERPRETATION OF ONE STATUTE OR SOME ITS PRO- SUPPORTED BY INAPPLICABLE CASES TO NEGATE THE STATUTORY IMPACT OF OTHER SECTIONS OF THE SAME OR OTHER STATUTES.

APPELLANT CONTENDS THAT THE APPLICABILITY OF THE CIRCUIT COURT'S RULING HAS NO BOUNDARIES.

APPELLANT S COMPUTATION OF ALTERNATIVE MINIMUM TAXABLE INCOME BASED ON THE GIGURE OF $ 24,386 APPEARING IN APPELLEE S COMPUTATION IN REVISED TREASURY SCHEDULE G ARRACHED TO ITS COMPUTATION INCORPORATED IN THE DECISION OF THE TAX COURT, WHICH APPELLANT CONSIDERS AVERAGE ADJUSTED TAXABLE INCOME UNDER THE PROVISIONS OF THE INCOME AVERAGING OF THE INTERNAL REVENUE CODE (secs. 1301-1305):

AVERAGE ADJUSTED gross income	$ 24,386.00
Less: Zero bracket a,ount $1,700.	
$1,000 times the amount of exemptions 2,000.	(3,700.00
	$ 20,686.00
Capital gains deduction.....	136,030.00
	$156,716.00
Less statutory exclusion....	10.000.00
	$146,716.00
Amount taxable at 10% $20,000. Tax	$ 2,000.00
Amount taxable at 20% 20,000. Tax	4,000.00
Amount taxable at 25% 106,716 Tmax	26,679.00
Total A;ternative minimum tax	$ 32,679.00
Regular Income Taxp Income Averaging	32.494.00
Alternative Minimum tax.....$	185.00

CONTINGENT CONSTITUTIONAL ISSUE

Appellant asserts the unusual circumstances herein as warranting clasdifying the constitutional issues, as contingent.

It is emphasized that initially the respondent's computer which had not been programmed to provide for 'income averaging', issued a computer print-out which made no provisions for the inclusion of appellant's Treasury Dept. Tax Form, Schedule G (Income Averaging)attached to appellant's tax form 1040, in the computation of adjusted gross income to be included in the computation of alternative minimum taxable income , and the result was a computation of adjusted gross income as though Schedule G (Income Averaging) did not exist.

Appellant contends that the statutory impact of the attaching of appellant s Schedule G (Income Averaging) to his tax form 1040 pursauant to the provisions of

the Internal Revenue Code and the Regulation of the Secretary of the Treasury evidencing his statutory election to average his income, had the statutory impact of the same force and effect as though Schedule G was part of the said tax form 1040, and that by reason of the statutory impact, that immediately upon the attachment of the said Schedule G, the adjusted gross income of the computer year (1980) and the base years were averagedas though the said tax returns were amended.

It is appellant's contention that Section 55(b)(1) of the I.R.C. is unconstitutional to the extent that it may be interpreted as asserted by the Circuit Court and the Tax Court and disputed by appellant . that the term 'adjusted gross income' appearing in said Section 55 (b)(1), authorizes the inclusion in the computation of the Alternative Minimum Taxable Income

initial adjusted gross income appearing in Tax Form 1040 (before income averaging under said Schedule G (Income Averaging), rather than the computed average income appearing in said Schedule G, incorporated in the Tax Court s decision, and as provided in the Internal Revenue Code(secs. 1301-1305), thereby directly or indirectly negating, nullifying and/or voiding the tax benefits of said Secs. 1301-1305; whereas taxpayers who have similar gross income but no preferential income subjecting them to the provisions of Sec. 55 of the I. R.C. retain the statutory tax benefits of income averaging.

CONCLUSION

Appellant contends that the Ruling of the Circuit Court is ofgreat import not only that it affects all taxpayers similarly situated as the appellant, but that the applicability of the Circuit Court's ruling in the administration not only of the Internal Revenue Act but all statutes, cannot be over-emphasized.

The Circuit Court ruling negates the statutory impact of the income averaging provisions of the Internal Revenue Code (secs. 1301-1305) through its interpretation that Section 55 of the I.R.C. is separate and that its tax is separate and that income averaging provisions of the I. R. C. do not apply. In this manner the Circuit Court literally brushs aside the provisions of Section 1304, mandating the inapplicability of certain sections of the Internal Revenue Code with respect to the said income averaging provisions,

but excluding sec. 55 of the I.R.C., thus making said section 55 applicable, Thus the Circuit Court ruling e liminates the mandatory statutory provisions respecting inapplicability of said Section 1304, and substituting its interpretation of the rulings in the Stockman case (supra) and the Riley case (supra)to support its ruling of inapplicability of the income averaging provisions in the computation of the alternative minimum taxable income to be included in the computation of the alternative minimum tax.

In this manner the Circuit ruling negates the statutory tax benefits of income averaging(secs. 1301-1305, negates the inapplicability provisions of said section 1304, and finally approves the initial print-out of a computer which had made no provisions for the inclusion of the said appellant's schedule G (income averaging), the revised version of

which is incorporated in the tax Court's decision.

APPELLANT EMPHASIZES EMPHATICALLY THAT THE RILEY AND STOCKWELL CASES DID NOT NEGATE ANY STATORY PROVISIONS RESPECTING INCOME BUT MERELY RULED IN THE RILEY CASE THAT THERE WAS NO STATUTORY PROVISIONS FOR INCOME AVERAGING AND IN THE STOCKWELL CASE THE COURT RULED THAT THERE WAS NO STATUTORY PROVISIONS FOR THE AVERAGING OF THE MINIMUM TAX.

APPELLANT RESPECTFULLY CONTENDS THAT THE RULING OF THE CIRCUIT COURT HAS THE EFFECT OF SUBSTITUTING THE COURT S LEGISFOR THE STATUTORY MANDATE RESPECTING THE INAPPLICABILITY OF CERTAIN SECTIONS OF THE INTERNAL REVENUE CODE WITH RESPECT TO THE INCOME AVERAGING PROVISIONS AND SINCE SECTION 55 WAS NOT INCLUDED, THE CONCLUSIS THAT THE INCOME AVERAGING PROVISIONS OF THE I.R.C. APPLY TO SECTION 55 AND THE

CIRCUIT COURT HAD NO POWER TO BRUSH ASIDE MANDATORY PROVISIONS RESPECTING THE APPLICABILITY OF SECTION 55 AND BY AN INTERPRETATION OF SECTION 55 AND THE APPLICATION OF NON-APPLICABLE DECISIONS (THE RILEY AND STOCKWELL CASES) TO NEGATE THE APPLICABILITY OF INCOME AVERAGING PROVISIONS IN THE DETERMINATION OF THE ALTERNATIVE MINIMUM TAXABLE INCOME TO BE INCLUDED IN A BASE FOR THE COMPUTATION OF THE ALTERNATIVE MINIMUM TAX, AND THEREBY NEGATE THE STATUTORY TAX BENEFITS UNDER INCOME AVERAGINGPROVISIONS OF THE INTERNAL REVENUE CODE, AND THEREBY CREATE A TAX DEFICIENCY OF PRACTICALLY THE SAME AMOUNT, WHICH IS THE SUBJECT OF THIS APPEAL.

FOR THE FOREGOING REASONS, THE COURT SHOILD NOTE PROBABLE JURISDICTION.

Respectfully submitted,

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